UTHAMA KUMARA NAIDU SUNDARA RAJOO & ANOR v. HSBC BANK MALAYSIA BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG J
[SUIT NO: WA-22NCC-279-07-2020]
5 FEBRUARY 2023

Abstract – *A bank, in exercising a power of sale, will owe a duty of care to the borrower and owner of the property who has an interest in the surplus, if any, from the sale proceeds to take reasonable care to obtain the true market value of the property. Given, however, that a bank's relationship with its customers is primarily contractual, alleged breaches of duty must be considered based on the contractual duty. Such contractual duty must take precedence especially if the said duty of care in tort seeks to impose on the bank a tortious duty that is wider than that which are provided in the contractual terms agreed upon between the bank and its customers.*

TORT: *Duty of care – Breach – Allegations of – Duty of care of bank – Auction – Purchaser bought property and took facility from bank to part finance purchase of property – Default in payment of facility instalments – Bank exercised right to sell property by way of auction – Whether bank negligent and breached duty of care to purchaser – Whether bank took reasonable precautions to obtain true market value of property – Whether bank required to obtain consent of Insolvency Department to auction off property as purchaser was bankrupt – Whether bank required to inform developer of auction – Whether auction carried out in regular manner*

LAND LAW: *Vacant possession – Counterclaim – Purchaser bought property and took facility from bank to part finance purchase of property – Default in payment of facility instalments – Bank exercised right to sell property by way of auction – Successful bidder prevented from taking vacant possession of property after completing purchase – Whether successful bidder entitled to vacant possession*

At the commencement of this suit, the first plaintiff was a bankrupt with sanction of the Insolvency Department of Malaysia to commence this suit while the second plaintiff was the brother of the first plaintiff and purportedly held the first plaintiff's power of attorney. The first plaintiff's bankruptcy was later discharged. The first plaintiff had bought a property in 2005 for a sum of RM1,030,074 and to part finance the property, the first plaintiff took a facility of RM772,555 from the first defendant ('bank'). By way of a deed of assignment ('DOA'), the first plaintiff assigned all rights, interest and title of the property to the bank and executed a power of attorney ('POA') in

favour of the bank. The first plaintiff defaulted in the payment of his facility instalments. The bank recalled the facility, demanded payment and also gave notice that the bank would exercise its right to sell the property in the event such payment was not received. Payment was not received and the bank terminated the first plaintiff's right to possession and/or occupation of the property and exercised its rights to sell the property by way of auction. The second defendant was an auctioneer while the third defendant was the successful bidder and purchaser of the property. In the present suit, the plaintiff submitted that: (i) the bank was negligent and breached its duty of care to the first plaintiff by (a) failing to take reasonable precautions to obtain the true market value of the property and sold the property at an undervalue of RM1,004,430 when the open market value of the property was RM1,900,000; (b) refusing to accept the banker's cheque in the sum of RM111,603 from the plaintiff's representative, the second plaintiff, to regularise the arrears of instalments in full; (c) failing to obtain the consent of the Insolvency Department to auction off the property as the first plaintiff was a bankrupt; and (d) not informing the developer of the auction although the property was in the name of the developer after the issuance of the issue document of title to the property; (ii) the second plaintiff was not allowed by the second defendant to bid despite being present with a cheque in the sum of RM111,603 to bid at the auction on the grounds that he did not register and pay a deposit a day before the bidding when there was no such requirement; (iii) the auction was not carried out properly; (iv) the third defendant was not present during the bidding. The property was bid by the third defendant's agent although he was not registered a day before the bidding; and (iv) the third defendant, as the successful bidder, only paid the full purchase price four months after the completion date and he had misled the security guards and the plaintiffs' parents who were occupying the property and were not aware of the legal proceedings that he was now the owner of the property and attempted to trespass onto the property. The third defendant counterclaimed against the plaintiffs for an order for vacant possession of the property, special damages in the sum of RM10,000 for loss of rental and bank charges, general and aggravated damages due to the plaintiffs' refusal to deliver vacant possession.

Held (dismissing plaintiffs' claim and allowing in part third defendant's counterclaim):

(1) The plaintiff's production of valuation certificate to show that the property was valued at RM1.9 million was insufficient to show that the bank had breached its duty of care. The plaintiff's witness himself (i) admitted that in valuing the property, he did not make a comparative value of the other properties; (ii) agreed that the valuation certificate was not a valuation report that was complete; and (iii) said that although he did an analysis of the price per square foot, yet the analysis was not set

out in the certificate of valuation. It was unsafe to rely on the certificate of valuation and there was no credible basis for the value of RM1.9 million. There was also no evidence adduced to show that the auction was fraudulently, recklessly or negligently conducted. Neither was there any evidence to show that there was any impartial buyer who was willing to pay more than RM1,004,430 for the property. (paras 48 & 49)

(2) Clause 15 of the facility agreement plainly provided that upon the first plaintiff's default, the entire balance principal sum interest thereon and all other monies due and owing under the facility shall become immediately payable by the first plaintiff to the bank. Clause 10 of the DOA contained a similar obligation. There was, as such, no duty upon the bank to accept any part payment from the plaintiffs. The first plaintiff was bound by what he signed. That there was default in payment to the bank was not disputed. Thus, cl. 15 of the facility agreement read together with cl. 11 of the DOA put it beyond a shadow of a doubt that the bank was entitled to recover the entire sum outstanding. (para 22)

(3) As for the complaint that the bank's representative refused to accept the sum of RM111,603 from the second plaintiff, the plaintiffs did not produce a single correspondence to lend credence that they had made such an attempt to settle. Not only that, the said sum was insufficient to pay the sum of RM741,000 due to the bank. There was, strictly speaking, no obligation nor duty on the bank's part to accept part payment. The allegation of attempts to pay the sum smacked of a wholly misconceived afterthought. (para 23)

(4) The requirement that a 'bidder shall be registered at least one day before the auction date together with deposit' was quite standard in all auction sales. Such similar terms are even found in court held e-auctions. As such, the plaintiffs were clearly clutching at straws in making this complaint. The plaintiffs' complaint that cl. 2(c) in the proclamation of sale, which stated 'the auctioneer has the right to deny any bidder from bidding for the property without assigning any reason', had denied the first plaintiff from securing a better sale price, as other potential bidders may have stayed away, did not hold water. Such a clause was not and unusual was necessary to ensure that only persons who are eligible be allowed to bid and that the due process of the auction proceeds without any interference or disruption. The fact remained that there was only one bidder. (paras 31 & 32)

(5) The second plaintiff was not a credible witness and his evidence ought to be rejected or, at the very least, treated with caution and suspicion. There was no evidence adduced by the plaintiffs to prove that the second defendant denied the second plaintiff from bidding for the property. (paras 38 & 39)

(6) As the bank was a secured creditor, the secured asset 'stands outside' the bankruptcy. This complaint fell. As such, there was no duty for the bank to seek such consent. (para 55)

(7) There was no provision in law that mandated the bank to inform the developer prior to the auction. In fact, the evidence showed that the bank did inform the developer as recent as June 2019. It was also significant to note that the developer had been dissolved. (para 56)

(8) The sale was not at an undervalue. Furthermore, a sale at an undervalue did not mean that the auction was automatically set aside unless the undervalue was so evident as to be decisive of fraud or gross want of the proper standard of care. There was not a scintilla of evidence here that there was gross of want of care or fraud. The plaintiff's fight for the property must yield the higher claim of the third defendant as the successful bidder who had completed the purchase. The complaints raised were offered as the plaintiff's stratagem to buy time, cling on to the property while suit 'drags its weary length before the court' and to avoid the inevitable. (paras 76 & 77)

(9) The third defendant had proven that he was present at the auction and it could not be disputed that the third defendant made full payment and completed the auction sale. He succeeded in his counterclaim. The third defendant was entitled to judgment for vacant possession of the property to be delivered to him. The third defendant attempted and was prevented from taking vacant possession of the property after he completed the purchase. This was evident from the plaintiffs' own assertions of trespass by the third defendant. To frustrate the third defendant from taking vacant possession, the plaintiffs in fact applied for an injunction to restrain the third defendant from taking possession of the property. The third defendant had suffered losses and damages and was entitled to claim such losses from the plaintiffs. However, the special damages of RM10,000 a month claimed was not broken down and itemised in the pleadings. It was just to award (i) general damages of a sum of RM5,000 a month for loss of rental or as damages for being kept out of use of the property from the date of full payment of purchase price to the date of delivery of vacant possession; and (ii) exemplary damages at RM37,500. In granting the claim for exemplary damages, it was to state the court's disapproval of such conduct. (paras 79-81)

Case(s) referred to:

Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109 HC ***(refd)***

Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Campbell v. Pye (1954) 54 SR (NSW) 308 ***(refd)***

CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd [2006] 2 CLJ 409 CA ***(refd)***
Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062 CA ***(refd)***
Davis v. Anthony [1995] Lexis Citation 1896 ***(refd)***
Eon Bank Bhd v. BH Steel Sdn Bhd; Guan Seng Steel Sdn Bhd (Intervener) [2004] 7 CLJ 422 HC ***(refd)***
Goh Teng Whoo & Anor v. Ample Objectives Sdn Bhd [2021] 4 CLJ 348 FC ***(refd)***
Ho Kean Pin v. Malayan Banking Bhd & Anor [2020] 1 LNS 1107 HC ***(refd)***
Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***
Instantcolor System Sdn Bhd v. Inkmaker Asia Pacific Sdn Bhd [2017] 4 CLJ 1 FC ***(refd)***
Jones & Saldanha v. Gurney [1913] WN 72 ***(refd)***
Liu Yiu Keung Stephen v. Keen Lloyd Resources Ltd (In Liq) [2007] 1 HKC 605 ***(refd)***
Malayan Banking Bhd v. Lim Poh Ho & Anor [1997] 2 CLJ 516 CA ***(refd)***
Mercu Pusu Development Sdn Bhd v. Setara Jaya Sdn Bhd [2022] 2 CLJ 106 HC ***(refd)***
My Home Budget Hotel Sdn Bhd v. CIMB Bank Bhd [2022] 5 CLJ 604 HC ***(refd)***
Noresah Lani v. RHB Bank Bhd [2006] 8 CLJ 307 HC ***(dist)***
Paul Murugesu Ponnusamy Sebagai Wakil Nalamah Sangapillay (P) (Simati) v. Cheok Toh Gong & Ors [1996] 2 CLJ 397 SC ***(refd)***
Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***
Protasco Bhd v. Tey Por Yee & Anor And Other Appeals [2021] 9 CLJ 349 FC ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Sean Thornton v. Northern Ireland Housin Executive [2010] NIQB 4 ***(refd)***
Sin Heap Lee - Marubeni Sdn Bhd v. Yip Shou Shan [2004] 4 CLJ 35 CA ***(refd)***
Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor [1992] 1 LNS 7 HC ***(refd)***
Tey Por Yee & Anor v. Protasco Bhd & Other Appeals [2020] 5 CLJ 216 CA ***(refd)***
Wee Tiang Kheng & Ors v. Ngu Nii Soon & Ors [1989] 1 CLJ 267; [1989] 2 CLJ (Rep) 639 HC ***(refd)***
Wee Tiang Peck v. Teoh Poh Tin [1994] 1 LNS 154 HC ***(refd)***

Legislation referred to:

Auction Sales Enactment (FMS Cap 81), s. 4
Bankers' Books (Evidence) Act 1949, s. 7(1)
Evidence Act 1950, s. 114(g)
Federal Constitution, art. 13
Financial Services Act 2013, ss. 124, 133, 134, Schedules 7, 11
Powers of Attorney Act 1949, ss. 4, 5
Rules of Court 2012, O. 59 r. 16

For the plaintiffs - A Nagarajan & Jaswander Singh; M/s Shafee & Co
For the 1st defendant - Pauline Koh, Koh Xiu Yi & Sathya Kumardas; M/s Shearn Delamore & Co
For the 2nd defendant - Kamal Ishmael Mohd Ariff & Mahendran Shunmugam; M/s Izauddin Firdaus & Mahendran
For the 3rd defendant - Yusri Farid Mat Sood & Mohd Omar; M/s Yusri Omar Arshad & Partners

Reported by Lina E

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JUDGMENT

Liza Chan Sow Keng J:

Introduction

[1] In this action filed on 7 July 2020, the plaintiffs sought, *inter alia,* the following reliefs:

B

(i) a declaration that the proclamation of sale issued by second defendant is null and void;

(ii) a declaration that the auction of the property held on 19 November 2019 is null and void;

C

(iii) to injunct the first defendant from completing the sale of the property identified as No. 21, Jalan Puncak 2, Taman Puncak Bukit Utama, Bukit Antarabangsa, 68000 Ampang, Selangor Darul Ehsan which was auctioned on 19 November 2019;

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(iv) to injunct the first defendant from executing the deed of assignment (by way of transfer) to give a good title to the third defendant and his financier the property;

(v) to injunct the third defendant from transferring the property to his name on the individual issue of document of title;

E

(vi) to injunct the third defendant from taking possession of the property and/or any proceedings to evict the persons in occupation and/or to trespass on to the property until the suit is finally disposed off;

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(vii) to set aside the sale by auction of the property;

(viii) a declaration for an account of all instalments paid and payments made by the first plaintiff to settle the outstanding arrears of the instalments defaulted and late payment charges incurred until the date of auction;

G

(ix) to injunct the Companies Commission of Malaysia from executing the memorandum of transfer to transfer the property to the third defendant;

(x) to prohibit and/or injunct the Pengarah Tanah dan Galian Negeri Selangor from registering the third defendant's name as the registered owner of the property;

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(xi) a declaration that the first defendant is vicariously liable for the acts and/or omissions of the second defendant;

(xii) to forfeit the deposit and credit it to the housing loan account of the first plaintiff with the first defendant;

I

(xiii) set aside the extended completion period of the sale contract dated 19 November 2019; and

(xiv) general damages to be paid by the first, second and third defendants.

[2] All three defendants filed their respective defence. The third defendant counterclaimed against the plaintiffs for an order for vacant possession of the property, special damages in the sum of RM10,000 for loss of rental and bank charges, general and aggravated damages due to the plaintiffs' refusal to deliver vacant possession.

[3] After a full trial conducted virtually online by using the Zoom video conferencing platform lasting eight days, I had on 12 December 2022 dismissed the plaintiffs' claim and allowed in part the third defendant's counterclaim. This judgment contains the reasons for my decision. At the outset, I ought to say that on the facts of the present case, I am in accord with the arguments canvassed by the first defendant's learned counsel, Ms Sathya Kumardas, and adopt her submissions in these grounds.

Background

[4] The first plaintiff ('P1') at the commencement of this suit, is said to be a bankrupt with sanction of the Insolvency Department of Malaysia/ Jabatan Insolvensi Malaysia to commence this suit whilst the second plaintiff ('P2') is the brother of P1 and purportedly holds P1's power of attorney. P1's bankruptcy was said to be discharged on 29 December 2020.

[5] P1 in 2005, bought the residential property with an address as No. 21, Jalan Puncak 2, Taman Puncak Bukit Utama, Bukit Antarabangsa, 68000 Ampang, Selangor Darul Ehsan ('the property') for a sum of RM1,030,074.

[6] To part finance the purchase of the property, P1 by a facility agreement dated 28 February 2006 and letter of offer dated 27 October 2005 ('the agreement') took a facility of RM772,555 from the first defendant (interchangeably 'D1' or 'the bank') and as security for the facility, by deed of assignment ('DOA') on the same date assigned all present and future right, interest and title the property to the bank, and also executed a power of attorney ('POA') in favour of the bank appointing the bank as his lawful attorney in relation to the property.

[7] The second defendant ('D2') is an auctioneer whilst the third defendant ('D3') is the successful bidder and purchaser of the property.

[8] P1 defaulted in payment of his facility instalments. The bank by letter dated 30 May 2017, recalled the facility, demanded payment of the outstanding sum of RM716,844.16 as at 24 May 2017 within 14 days, and also gave notice that the bank will exercise its right under the agreement, DOA and POA, to *inter alia*, sell the property in the event such payment is not received. Payment as demanded was not received and by its solicitors' letter dated 11 August 2017, the bank terminated P1's right to possession and/or occupation of the property and exercised its rights under the agreement, the DOA and POA to sell the property by way of auction.

[9] After seven previous attempts by the bank to auction the property were unsuccessful due to no bidders, the property was ultimately auctioned off on 19 November 2019 to D3 as the successful bidder. The details of the attempts by the bank to auction the property are:

Auction Dates	Reserve Price	Remark
27.4.2019	RM2,100,000.00	Unsuccessful as there were no bidders
27.5.2019	RM1,890,000.00	Unsuccessful as there were no bidders
24.6.2019	RM1,701,000.00	Unsuccessful as there were no bidders
26.7.2019	RM1,530,900.00	Unsuccessful as there were no bidders
24.8.2019	RM1,377,810.00	Unsuccessful as there were no bidders
20.9.2019	RM1,240,030.00	Unsuccessful as there were no bidders
19.10.2019	RM1,116,030.00	Unsuccessful as there were no bidders
19.11.2019	RM1,004,430.00	Successful

[10] On 15 June 2020, the sale of the property was duly completed by D3.

Plaintiffs' Case

[11] In essence, the plaintiffs' case against the defendants is that:

(i) the bank owes a duty of care to P1. Arising from the bank's exercise of its rights to auction off the property assigned to it as security following P1's default in failing to make repayment of his loan facility with the bank, the bank was negligent and breached its duty of care to P1:

(a) in failing to take reasonable precautions to obtain the true market value of the property and sold the property at an undervalue of RM1,004,430 when the open market value of the property as at 1 November 2019 is RM1,900,000;

(b) when its officer, DW5 refused to accept payment of RM111,603 from P1's representative, P2 who attempted to make payment of RM111,603 by way of Hong Leong banker's cheque no. 148987 to the bank to regularise the arrears of instalments in full, and/or refusing to consider various occasions between 19 October 2019 to 18 November 2019 attempts by P2 to make payment of the sum of RM111,603 to the bank and/or refused to consider payment from anticipated sale of another property belonging to P1 which will yield a surplus sum of RM1,200,000;

(c) in refusing to call off the auction despite Bank Negara Malaysia officer's one Cik Fazlin's "advice";

(d) the bank did not obtain the consent of the Department of Insolvency to auction the property as P1 was a bankrupt;

(e) the bank did not inform the developer of the auction although the property is in the name of the developer after the issuance of the issue document of title to the property.

(ii) P2 was not allowed by the auctioneer D2 to bid despite being present with a Hong Leong Banker's cheque no. 148987 for the sum of RM111,603 to bid at the auction of the property on 19 November 2019 at 2pm on grounds that P2 had to be registered and pay the deposit of 10% a day before the auction when there is no such requirement in the proclamation of sale; the bank is vicariously liable for the actions of D2;

(iii) The auction was not carried out properly;

(iv) D3 was not present during the bidding; the property was bid by one Kenny Wong as D3's agent although he was "not registered" a day before the bidding, P2 was informed by D2's staff at the auction premise that there was no other "registered" bidder yet an "unregistered bidder" was allowed to bid for the property;

(v) D3 as the purported successful bidder only paid the full purchase price of the property on 15 June 2020 which is four months after the completion date of 18 February 2020; and D3 misled the security guards and the plaintiffs' parents who were occupying the property and were not aware of the legal proceedings that he is now the owner of the property, and attempted to trespass onto the property on 24 October 2020.

The Defendants' Case

[12] In summary, the contentions are:

Bank

(i) The plaintiffs' pleaded case for negligence against the bank is unsustainable as:

(a) P2 has no privity of contract with the bank and has no registered interest in the property, has no *locus* to maintain an action against the bank;

(b) P1 was given more than sufficient indulgence over a period of more than two years since the first letter of demand to P1 on 30 May 2017 to either make payment of arrears outstanding under the facility or to redeem the property but has failed or refused to do so;

(c) The bank had rightfully exercised its powers of sale following P1's continuing default under the terms of the agreement, the DOA and the POA;

(d) The auction was properly held in accordance with the terms of the agreement, the DOA and the POA;

(e) The property was eventually sold at RM1,004,430 as there were no buyers in the open market who were prepared to pay more for the said property;

(f) At no time did D2 refuse or deny P2 form bidding for the property;

(g) P1 was duly informed of all auction dates, including the successful auction of 19 November 2019; and

(h) The bank is legally entitled to enforce its rights under the DOA notwithstanding the issuance of the issue document of title to the property.

D2 (Auctioneer)

(ii) the proclamation of sale made clear any interested bidder is to produce a 10% deposit of the reserve price *ie*, the sum of RM100,443 in the form of a cashier's order or bank draft in the name of the bank; P1 and/or P2 did not register as bidder on the auction day; the only registered bidder was D3 who produced the 10% deposit of RM100,443 and the property was successfully sold to him. At all material times, P2 did not ask to be registered. Neither D2 nor his staff had prevented D2 from registering as a bidder.

D3 (The Successful Bidder)

(iii) He was personally present during the auction and produced the 10% deposit as required; there were no other bidders and he was the successful bidder at the auction held on 19 November 2019 for the property. He had paid the full auction price of RM1,004,430 and is entitled to possession of the property but the plaintiffs refused to yield vacant possession as a result of which he is suffering loss and damages. D3 counterclaimed for an order for vacant possession and for loss incurred in interest and loss of rentals per month and damages.

The Issues

[13] The parties contrary to the court's directions did not agree on the issues to be tried and instead filed their respective issues for consideration. In my view, the issues to be tried culled in an objective and neutral fashion from the parties' pleadings are:

As Between P1 And The Bank

(i) whether a duty of care is owed to P1 by the bank?

(ii) if so, whether the bank has breached its duty of care to P1 in allegedly:

(a) refusing to accept payment *vide* Hong Leong bank banker's cheque no. 148987 for sum of RM111,603 on the eve of the auction on 18 November 2019 to hold off the auction;

(b) refusing to consider proposed payments from anticipated sale of another property belonging to P1;

(c) refusing to call off the auction despite Bank Negara officer Cik Fazlin's "advice" to do so;

(d) denying P2 from bidding for the property;

(e) refusing to provide the sales contract and/or reveal the details of D3 without D3's consent;

(f) selling the property at an undervalue;

(g) failing to notify P1 of the 19 January 2019 auction by serving the notice of auction and proclamation of sale;

(h) whether bank was hasty in carrying out eight auctions of the property over seven months;

(iii) whether the bank is required to obtain consent of the Insolvency Department prior the auction sale of the property;

(iv) whether bank must inform the developer prior to the auction since the issue document of title is still in the developer's name;

(v) whether the transfer and charge of the property is required to be perfected for foreclosure proceedings to be commenced under the National Land Code?

(vi) whether bank is entitled to grant extension of four months to D3 to complete payment of the auction price without the consent of P1?

(vii) whether P1 is entitled to any relief against the bank?

As Between P2 And The Bank

(viii) whether the bank owes any duty of care to P2?

(ix) if so, whether the bank is vicariously liable to P2 for the action of D2 in allegedly denying P2 from bidding for the property on 19 November 2019?

(x) whether P2 is entitled to any relief against the bank?

As Between P1, P2 And D2

(xi) whether P2 registered to bid for the auction on 19 November 2019 at Cosmo Hotel?

(xii) whether P2 gave Hong Leong Bank banker's cheque no. 148987 for sum of RM111,603 to D2 on the date of the auction?

(xiii) whether the auction was properly conducted in accordance with the terms of the proclamation of sale and sold to D3 as the successful bidder?

As Between Plaintiffs And D3

(xiv) whether there was delay by the plaintiffs in filing this action against D3;

(xv) whether D3 was present at the auction on 19 November 2019; a lawful bidder and purchaser and entitled to the property;

(xvi) whether D3 is entitled to vacant possession of the property after he completed the purchase and if so:

(a) whether he was prevented from taking vacant possession of the property after he completed the purchase?

(b) whether D3 has suffered losses and damages and entitled to claim such losses from P1and P2?

Analysis And Findings

[14] The plaintiffs bear the legal and evidential burden to prove on a balance of probabilities of establishing a case against the defendants throughout the trial.

[15] Before I deal with the issues, I should mention that the plaintiffs had in their reply submission urged that the evidence of DW2 (Lim Lee Wah, officer from Hong Leong Bank Berhad ('HLB')) be expunged and with that, exh. D6A (Hong Leong Bank banker's cheque no. 148987 dated 18 October 2019 for sum of RM111,603) and exh. D6B (repurchase voucher dated 4 November 2019) produced by her will be rendered inadmissible. When the matter was fixed for clarification/decision on 22 September 2022, I had invited submissions by the parties to deal with two matters:

(i) whether the evidence of DW2 ought to be expunged on the grounds that such evidence is in breach of ss. 133 and 134 of the Financial Services Act 2013 ("FSA"); and

(ii) whether the Hong Leong Bank banker's cheque no. 148987 dated 18 October 2019 for sum of RM111,603 (exh. D6A) and the repurchase voucher dated 4 November 2019 (exh. D6B) are admissible as evidence.

[16] I should deal with these two issues at the outset.

[17] Section 133 and s. 134 of the FSA provide that:

133.

(1) No person who has access to any document or information relating to the affairs or account of any customer of a financial institution, including:

(a) the financial institution; or

(b) any person who is or has been a director, officer or agent of the financial institution,

shall disclose to another person any document or information relating to the affairs or account of any customer of the financial institution.

(2) Subsection (1) shall not apply to any document or information relating to the affairs or account of any customer of a financial institution:

(a) that is disclosed to the Bank, any officer of the Bank or any person appointed under this Act or the Central Bank of Malaysia Act 2009 for the purposes of exercising any powers or functions of the Bank under this Act or the Central Bank of Malaysia Act 2009;

(b) that is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular customer of the financial institution to be ascertained from it; or

(c) that is at the time of disclosure is, or has already been made lawfully available to the public from any source other than the financial institution.

(3) No person who has any document or information which to his knowledge has been disclosed in contravention of subsection (1) shall disclose the same to any other person.

(4) Any person who contravenes subsection (1) or (3) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both.

134(1) A financial institution or any of its directors or officers may:

(a) for such purpose or in such circumstances as set out in the first column of Schedule 11, disclose any document or information relating to the affairs or account of its customer to such persons specified in the second column of that Schedule; or

(b) disclose any document or information relating to the affairs or account of its customer to any person where such disclosure is approved in writing by the Bank.

…

[18] Schedule 11 of the Financial Services Act 2013 reads:

First column	Second column
Purposes for or circumstances in which customer documents or information may be disclosed	Persons to whom documents or information may be disclosed
Compliance with a court order made by a court not lower than a Sessions Court.	All persons to whom the disclosure is required to be made under the court order.

[19] Having read the submissions of the parties, I find:

(i) section 134 of the FSA read with Schedule 11 allows DW2 to give evidence pursuant to the subpoena *duces tecum* issued to her which was under this court's seal, and such subpoena constitutes an order to produce the documents stated therein to the court – this court is not lower than the Sessions Court. Her evidence and the documents she produced are admissible and having been marked as exhibits, this court is impelled to consider the evidence;

(ii) given that the banker's cheque and repurchase voucher were documents tendered by DW2 and her evidence was given pursuant to the subpoena which represent court orders, the plaintiffs' contention there is a breach of s. 133 of the FSA by the defendants is bereft of merits. In this regard, I am in accord with the views of Ong Chee Kuan JC (as he then was) in *My Home Budget Hotel Sdn Bhd v. CIMB Bank Bhd* [2022] 5 CLJ 604; [2021] MLJU 2780. There is thus no reason to expunge DW2's evidence;

(iii) in any case, notwithstanding my view that exh. D6A and D6B do not fall within the definition of banker's book, "they were still admissible under the Evidence Act 1950 if the legal requirements for admission, particularly that of relevancy, had been satisfied" – see *Protasco Bhd v. Tey Por Yee & Anor And Other Appeals* [2021] 9 CLJ 349; [2021] 6 MLJ 1 FC at [134];

(iv) added to that, it will be recalled that during trial, following the non-objection of the plaintiffs' counsel (see notes of proceedings ('NOP') vol. 4 pp. 685-686), the said Hong Leong Bank banker's cheque and the repurchase voucher were marked as exhs. D6A and D6B respectively. Having been marked as exhibits, admissibility cannot be disputed, the question which remains is whether they are relevant as evidence;

(v) of important significance to me in so deciding is that the pivot of the plaintiffs' case is that:

(a) the auctioneer allegedly prevented P2 from bidding at the 19 November 2019 public auction despite P2 was in possession of Hong Leong Bank banker's cheque no. 148987 for sum of RM111,603;

(b) the bank had allegedly refused to accept payment of RM111,603 *vide* of Hong Leong Bank banker's cheque no. 148987 from P2 on 18 November 2022 – the day before the auction;

(vi) exhibit D6A, D6B and DW2's evidence in this regard is not only relevant but crucial. The admission of these documents and DW2's evidence will assist the court in determining if there is any truth or basis to the plaintiffs' claim.

[20] I move on to deal with the issues.

Whether A Duty Of Care Is Owed To P1 By The Bank?

[21] Implicit in the question whether the bank is negligent, and breached its duty of care, is whether a duty of care is owed in the first place. I take it as settled law that a bank in exercising a power of sale will owe a duty of care to the borrower and owner of the property (P1) who has an interest in the surplus (if any) from the sale proceeds to take reasonable care to obtain the true market value of the property. Given, however that a bank's relationship with its customers is primarily contractual, I agree with the authorities cited by the bank's learned counsel that alleged breaches of duty must be considered based on the contractual duty, such contractual duty must take precedence especially if the said duty of care in tort seeks to impose on the bank a tortious duty that is wider than that which are provided in the contractual terms agreed upon between the bank and its customers.

Whether The Bank Breached Its Duty Of Care In (i) Refusing To Accept The Sum Of RM111,603 And/Or (ii) Refusing To Consider Payments From Surplus Proceeds Of Anticipated Sale Of Other Properties

[22] For starters, cl. 15, facility agreement dated 28 February 2006 plainly provides that upon P1's default, the entire balance principal sum, interest thereon and all other moneys due and owing under the facility shall become immediately payable by P1 to the bank. Clause 10 of the DOA contains a similar obligation. There is as such, no duty upon the bank to accept any part payment from the plaintiffs. P1 is bound by what he signed – see *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062; [2016] 3 MLJ 122 CA at [31], a case aptly cited by Ms Sathya Kumardas, learned counsel for the bank. Indeed, it is the court's duty to uphold bargains and not strike them down willy-nilly – *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327. That there is default in payment to the bank is not disputed. Thus, cl. 15 of the facility agreement read together with cl. 11 of the DOA, put it beyond a shadow of a doubt that the bank is entitled to recover the entire sum outstanding.

[23] The evidence evaluated show clearly and convincingly that the plaintiffs' postulation that on 18 November 2019, P2 had attempted to make payment of RM111,603 to the bank to regularise outstanding payments is

blatantly untrue. Hong Leong Bank banker's cheque no. 148987 for the said amount was incontrovertibly encashed and returned to Hong Leong Bank on 4 November 2019 *ie*, two weeks or 14 days earlier as evidenced by exh. D6B and as testified by DW2 (p. 682 NOP, vol. 4). There simply is not an iota of doubt that he did not possess the said banker's cheque with him on 18 September 2019. P2's evidence on this score is not only not credible, but also incredulous. As for the complaint that Ms Cathy (DW5) between 19 October 2019 to 18 November 2019 had refused to accept the sum of RM111,603 from P2, the plaintiffs did not produce a single correspondence to lend credence that they had made such an attempt to settle. Not only that, the said sum is insufficient to pay the sum of RM741,000 due to the bank as at 1 August 2018. I have not overlooked that various indulgences had already been accorded to P1 over the years. There is strictly speaking, no obligation nor duty on the bank's part to accept part payment. To me, this allegation of attempts to pay the sum of RM111,603 between 19 October 2019 to 18 November 2019 smacks of a wholly misconceived afterthought.

[24] As for the assertion that the bank did not consider payments from surplus proceeds of anticipated sale of another property belonging to P1, I accept the bank's evidence that the bank could not accept such a proposal as P1 was bankrupt at that material time as such, any surplus proceeds received from the sale of P1's properties would be payable to the Director General of Insolvency for distribution to ALL creditors on a *pari passu* basis. Such surplus sums if paid to the bank is liable to be clawed back under bankruptcy laws and deemed to be preferential payment.

[25] On the above considerations, I would answer the question in the negative.

Whether The Bank Failed In Its Duty Of Care By Failing To Call Off The Auction As Advised By Cik Fazlin An Officer From Bank Negara?

[26] The question is answered in the negative as Cik Fazlin was not called to give evidence. As such, the allegation that she had advised the bank to call off the auction remains hearsay evidence and is not admissible. At any rate, it would be unfathomable why Bank Negara would wish to interfere in any bank's lawful exercise of its contractual rights. I thus find there is no legal basis to impose such a duty on the bank.

Whether Bank Breached Its Duty Of Care In Imposing Unfavourable Clauses In The Proclamation Of Sale

[27] Clause 11(c) of the DOA provides:

> **Clause 11, Deed of Assignment**
>
> Upon the occurrence of any of the events of default described in Clause 15 of the Facility Agreement/Clause 10 of the Deed of Assignment, the Bank shall be entitled to exercise all or any of the rights and powers following:

…

(c) the right and power to sell, transfer or assign the said Property at such price or prices (based on the market value as determined by a valuer on the Bank's panel) and in such manner and subject to such conditions (whether by public auction or by private treaty or contract) as the Bank shall in its absolute discretion think fit free from any interest of the Borrower/Assignor howsoever.

[28] Here, P1 had agreed with the bank in the DOA that in the event of default, the bank may sell the property in such manner and subject to such terms as it in its absolute discretion deem fit. That there is default by P1 is irrefragable, and thus, in my view, the unquestionable right of the bank to sell the property. DW1 confirmed in testimony that the conditions of sale were set by the bank pursuant to cl. 11(c) of the DOA.

[29] The plaintiffs' allegation that an intended bidder must register and pay the 10% deposit one working day ahead of the auction is not proven; a reading of the proclamation of sale for the 19 November 2019 auction which does not contain such a term, easily debunks this allegation.

[30] The eighth auction carried out on 19 November 2019 is not to be confused with the previous auction sale on 19 October 2019 which was carried out virtually and not physically as revealed by the following evidence of the auctioneer (D2) and P2:

Cross Examination of DW1 (Page 645 NOP, Vol 3):

YF: Alright, ok, thank you Mr Leong. Ok, so now, I would like to refer to your Question and Answer No.11, Mr Leong. Ok, in short, you were saying in your Answer to Question 11, you were saying that generally, the bidder needs to deposit the 10% of the reserve price, yes? In order for them to be eligible to bid, in short, ok. So, now, the issue of 10% reserved price, is there any requirement for the bidder to place deposit one day before auction, in this particular auction date, on 19.11.2019?

Leong: No such requirement. They have to place on the day of auction.

YF: So, can I say that there's no requirement for placement of 10% deposit earlier, one day earlier than the auction date, in this particular auction, is that the case?

Leong: That's right. And in all other auctions I conducted for HSBC Bank, it's all onsite bidding. So, they have to place their bank draft on the day of auction.

Cross Examination of PW3 Page 196 NOP, Vol. 1:

KI: Ok. So, I'm going to page 447, proclamation of sale. Ok, it is stated here, you can see this is actually proclamation of sale on the 19.10.2019. It's the seventh auction, it's not the eighth, ok.

Here you can clearly see here, ok, I just read it out, 'Bakal pembeli boleh juga boleh membuat tawaran melalui online.' Ok. Then, 'Untuk tawaran melalui online, buat pendaftaran sekurang-kurangnya satu hari bekerja sebelum tarikh lelong untuk tujuan pendaftaran dan pengesahan.' Ok, now this condition is also reflected here, the condition of sale. I refer to page 451, 3.5. 451. Ok? How to bid. Ok, you can see here at 3.5, ok. 'E-bidders are required to complete the registration process by inserting evidence of payment … at least one working day before the auction date.' Ok?

Tharan: Ok.

KI: So going back to your question just now, ok, you answered by saying that you should register at least one day before the auction. Ok? That condition is valid for e-bidding. Do you agree with me?

Tharan: That's what I thought, I agree with you. But that's what I thought, it's for e-bidding.

KI: Ok. So that condition is not applicable, correct?

Tharan: Correct.

Cross Examination of PW2 Page 246 NOP, Vol. 1:

YF: Mr Sri Tharan, can you point out to the Court, yes, which clause in this proclamation of sale which states that any bidder shall be registered at least one day before the auction date together with the deposit?

Sri: It does not. It does not state.

[31] In any case, I accept DW1 and DW5's evidence that the requirement that "a bidder shall be registered at least one day before the auction date together with the deposit" is quite standard in all auction sales. Counsel for the bank also drew attention that such similar terms are found in court held e-auctions. As such, the plaintiffs are clearly clutching at straws in making this complaint.

[32] I find the plaintiffs' complaint that cl. 2(c) in the proclamation of sale which states "the auctioneer has the right to deny any bidder from bidding for the property without assigning any reason" has denied P1 from securing a better sale price, as other potential bidders may have stayed away does not hold water. Firstly, such a clause is not an unusual clause – see proclamation of sale in *Eon Bank Bhd v. BH Steel Sdn Bhd & Anor* [2004] 7 CLJ 422; [2005] 2 MLJ 753. Second, I am inclined to accept the bank's explanation that such a clause was necessary to ensure that only persons who are eligible be allowed to bid and that the due process of the auction proceeds without any interference or disruption. Third, the fact remains on 19 November 2019, there was only one bidder.

[33] There is no breach of duty of care as alleged. A

Whether P2 Was Denied From Bidding By D2 On 19 November 2019 And Thus The Bank Is Vicariously Liable

[34] This question is answered in the negative.

[35] I have taken into consideration that judicial appreciation includes but B is not limited to identifying the nature and quality of the evidence, assigning such weight to it as this court deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses (see: *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17; [1997] C 2 MLJ 62 (CA)).

[36] Gillen, J in the case of *Sean Thornton v. Northern Ireland Housin Executive* [2010] NIQB 4 instructively said:

> [12] Credibility of a witness embraces not only the concept of his truthfulness *ie*, whether the evidence of the witness is to be believed but D also the objective reliability of the witness *ie*, his ability to observe or remember facts and events about which the witness is giving evidence.
>
> [13] In assessing credibility the court must pay attention to a number of factors which, *inter alia*, include the following: E
>
> (i) The inherent probability or improbability of representations of fact;
>
> (ii) The presence of independent evidence tending to corroborate or undermine any given statement of fact;
>
> (iii) The presence of contemporaneous records;
>
> (iv) The demeanour of witnesses *eg*, does he equivocate in cross F examination;
>
> (v) The frailty of the population at large in accurately recollecting and describing events in the distant past.
>
> (vi) Does the witness take refuge in wild speculation or uncorroborated G allegations of fabrication;
>
> (vii) Does the witness have a motive for misleading the court;
>
> (viii) Weigh up one witness against another.

[37] If the oral evidence given by a witness is inconsistent with the H probabilities of the case, Gopal Sri Ram JCA (as His Lordship then was) in *CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd* [2006] 2 CLJ 409; [2006] 3 MLJ 1 held:

> [53] In our judgment, *the correct approach to the judicial assessment of evidence in a case where a witness has been contradicted by his or her previous inconsistent statement is to treat the whole of the evidence of that witness with caution.* But the I judge must consider and accept or reject, for good reasons, the

A explanation given by the witness for the inconsistency. *He may accept the whole or parts of the witness' evidence as inspires confidence in him as having a ring of truth for one or more reasons. For example, the evidence in question or parts of it may be consistent with the probabilities of the case or with other irrefragable evidence.* Or the judge may, *after paying careful attention to the demeanour of the witness, feel assured that his evidence in court is consistent with the probabilities of*
B *the case and is the truth.* (emphasis added)

[38] It is with these principles in mind that I do not find P2 a credible witness thus his evidence ought to be rejected or at the very least treated with caution and suspicion because P2's testimony that he was present at the auction on 19 November 2019 with Hong Leong Bank bankers' cheque for
C sum of RM111,603 which is more than the 10% deposit required was blown to smithereens by DW2's evidence and exhs. D6A and D6B. As alluded to earlier, this cheque as testified by DW2, was encashed on 4 November 2019 – two weeks before the public auction was held on 19 November 2019. At the very least, the reasonable inference on his assertion that he was present
D with the money to bid is an "invention". This effectively means the plaintiffs' claim against D2 crumbled as the plaintiffs' entire claim against D2 rests on this fact. This fact evidently shows P2 was economical with the truth on such an important issue.

[39] I find there is no evidence adduced by the plaintiffs to prove that the
E auctioneer (DW2) in fact denied P2 from bidding for the property. P2's own testimony does not show that he met or spoke to DW1, or DW3, who was the representative of the auctioneer seated at the reception table. Although P2 stated he spoke to "an Indian boy" at the reception table regarding the placement of the bid, he conceded during cross-examination that he made no
F efforts to verify if such a person was indeed a representative or employee of the auctioneer. He admitted under cross-examination that there were several other auctioneers present on that day.

[40] DW10 (interchangeably 'D3'), DW3 (representative of auctioneer) and DW6 (the lawyer who attended the auction process) testified that the
G successful bidder (DW10) was present, and they did not witness P2 or other persons were denied the right to bid at the auction. Besides the evidence of DW1, DW3, DW6 that the successful bidder (DW10) was present at the auction, is also borne out by (i) the successful bidder's signature appearing on the registration form (pp. 420 to 421, CBD3; and the successful bidder's
H signature appearing on the contract of sale dated 19 November 2019. Nothing turns on the plaintiffs' argument that the registration form of the successful bidder was created after the suit was filed as no NRIC number or address of the successful bidder and serial numbers was found on the registration form. In this regard, I accept DW1's explanation that:

I

(i) no NRIC number/address of the successful bidder was stated in the registration form as the successful bidder's photocopy of identity card and the 10% deposit payment were annexed to the registration form (see pp. 420 to 421, CBD3).

(ii) the reference number of U366 contained in the registration form is sufficient for them to identity the property and therefore they do not need any serial number.

[41] I have treated P2 and his friend PW5's testimonies with caution that they have attended the auction, and there was no bidding "when the subject property came up, it flashed the words "SOLD" on the screen for reason that both were not able to show any other evidence that they were in fact present. Also, P2 as alluded to earlier was shown not to be credible. I have not overlooked that the plaintiffs have relied on the letter dated 2 December 2019, which alleges that DW5 has contacted P2 and informed him that she has spoken to the successful bidder's agent, and the agent said he will speak to the bidder as the bidder is out of country, to suggest that the successful bidder was not present at the 19 November 2019 auction but DW5 had strenuously denied having such a conversation with P2 (pp. 805 to 807, NOP vol. 4).

[42] P2 and P5's account of the events on the auction day of 19 November 2019 contradicted the evidence of DW1, DW3, DW6 and DW10 (the successful bidder). In this regard, I find that DW6 as the lawyer who attended the auction process had nothing to gain, and ought to be treated as an independent witness of truth; his evidence ought to be given due weight, and I have no reason not to accept the whole of his evidence. The plaintiffs' submission that DW6's signature is not the same in all copies of the memorandum of contract is not only not pleaded, it was not put to the witness. DW6 being the signatory would certainly be able to affirm that the signature therein belonged to him unless there is evidence to show otherwise.

[43] The evidence evaluated and weighed as a whole, show there is a paucity of evidence that P2 was in fact present and denied from bidding by D2.

[44] As such, the bank being vicariously liable does not even arise.

Whether Bank Breached Its Duty Of Care In Refusing To Provide The Sales Contract Or Render Details Of The Successful Bidder

[45] I find there is no such duty imposed contractually and nothing turns on the complaint of the redacted memorandum of contract provided by the bank to P2. I accept that the bank was entitled to be cautious not to run afoul of the provisions of the Personal Data Protection Act 2010 until directed by Wong Chee Lin J to do so on 9 July 2020.

Whether The Bank Breached Its Duty Of Care By Selling The Property At An Undervalue/Whether Bank Was Hasty In Carrying Out Eight Auctions Of The Property Over Seven Months?

[46] Before determining whether this duty of care was breached, it has to be firstly determined whether the property was in fact sold at an undervalue.

[47] In *Malayan Banking Bhd v. Lim Poh Ho & Anor* [1997] 2 CLJ 516; [1997] 1 MLJ 662, the CA held:

> (2) The bank had a narrow duty to take reasonable precautions to obtain the true value of the property at the time of sale, and was required to act in good faith, but *unless there was evidence of deliberate or wilful misconduct on the part of the bank, the 'duty to take reasonable precautions' would not be extended to cover every possible step an altruistic financier could have taken regardless of time, cost or effort* (see p. 672H); *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 MLJ 504, *Cuckmere Brick Co Ltd v. Mutual Finance Ltd* [1971] 1 Ch 949, *Brutan Investments Pty Ltd v. Underwriting and Insurance & Anor* (1981-1982) 39 ACTR 47 and *Downview Nominees Ltd v. First City Corp Ltd* [1993] 1 NZLR 513 followed.
>
> (3) *The true commercial value of a property was not what a valuer thought it should be, but the actual price that the property would fetch on the open market,* and hence the sale price of RM56,000 was the true market value because no impartial buyer was willing to pay more for the property. No admissible evidence was called by the respondents to rebut the bank's evidence of its valuations and failed auctions. Even if the respondents' evidence from their valuer was admissible, it was flawed because it was a retrospective opinion made in 1993 with no proper supporting materials (see pp. 670H-I and 671A-B).

[48] In this context, the plaintiffs' production of a valuation certificate of Kumpulan Jurunilai SB to show that the property was valued at RM1.9M is in my view insufficient to show that the bank has breached its duty of care as Yuzaimi (PW2) admitted that in valuing the property, he did not make a comparative value of the other properties; he agreed the valuation certificate was not a valuation report that is complete; although he said he looked at the data from Jabatan Penilaian dan Pemegang Harta, this data was not produced in the certificate of valuation. Although he did an analysis of the price per square foot, yet the analysis was not set out in the certificate of valuation. This court thus find it unsafe to rely on the certificate of valuation and further find there is no credible basis for the value of RM1.9M.

[49] Further, there is no evidence adduced to show that the auction was fraudulently or recklessly or negligently conducted. Neither is there any evidence to show that there is any impartial buyer who was willing to pay more than RM1,004,430 for the property.

[50] This court has also taken note that the plaintiffs did not challenge the reserve price of RM1,116,030 for the auction of the property conducted on 19 October 2019. Seeing no such challenge on the reserve price of RM1,116,030 for the seventh auction, the bank's argument that P1 is estopped from challenging the reserve price of RM1,004,430 by relying on the principles in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 is not unattractive.

[51] Additionally, P2 was present at the said auction and testified that he did not bid as there were no other bidders – p. 157 NOP, vol. 1. It is not co-incidence that the 10% deposit for that auction on 19 October 2019 would be the sum of RM111,603; the exact same amount in Hong Leong Bank banker's cheque no. 148987 dated 18 October 2019 which P2 alleged he attempted to pay the bank with before the auction on 19 November 2019 and allegedly attended the auction on 19 November 2019 with the said cheque except such testimony was exposed as preposterous, and a falsehood.

[52] As for the complaint of eight auctions being carried out over seven months, P1 had agreed with the bank in the DOA that in the event of default, the bank may sell the property in such manner and subject to such terms as it in its absolute discretion deem fit. Not only did the plaintiffs not bid at the seventh auction on 18 October 2019 neither did they complain that the auctions were held too close. Not that such a complaint will hold water, as firstly, P1 had a choice to redeem the property but did not, second, the complaint was kept up P1 and P2's sleeves until after the auction sale was completed, and third, the bank is not expected to wait "sehingga kucing bertanduk" for recovery of its money.

[53] Guided by the instructive pronouncements of the Court of Appeal in *Malayan Banking Bhd v. Lim Poh Ho*, I do not find the allegation that the property was sold at an undervalue has any teeth.

Whether The Bank Breached Its Duty Of Care In Allegedly Failing To Notify P1 Of The Auction On 19 November 2019

[54] Clause 41 facility agreement when given its plain and ordinary meaning means, any notice served by post to P1's given address or last known address shall be deemed to have been duly served three days after posting. The evidence shows P1 was informed by letter dated 7 November 2019 enclosing the proclamation of sale and sent to P1's last known address of No. 21 Jalan Puncak 2, Bukit Puncak Utama, Bukit Antarabangsa, Ulu Kelang, 68000 Selangor with proof of posting – see pp. 332 to 339, CBD2. *Goh Teng Whoo & Anor v. Ample Objectives Sdn Bhd* [2021] 4 CLJ 348 relied on by the plaintiffs is distinguishable and not applicable for in that case, there is no contractual mode of service agreed between parties; the relevant AR card to show proof of purported service of the writ by AR registered post was not produced before the court. I thus find this complaint is nothing but a bare statement and bereft of merits.

Whether The Bank Must Obtain Consent Of The Insolvency Department Prior The Auction Sale Of The Property

[55] As the bank is a secured creditor, the secured asset "stands outside" the bankruptcy; this complaint falls. As such I find there is no duty for the bank to seek such consent.

Whether Bank Must Inform The Developer Prior To The Auction Since The Issue Document Of Title Is Still In The Developer's Name

[56] I find there is no provision in law that mandates the bank to do so. In fact, the evidence show the bank did inform the developer as recent as June 2019. It is also significant to note that the developer has been dissolved.

Whether The Transfer And Charge Must Be Perfected So That Foreclosure Proceedings May Be Taken Under The National Land Code

[57] I find there is no requirement in law to do so. This question has been answered by the Federal Court in *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621; [2002] 2 MLJ 513:

> All things considered, we were more inclined to agree with learned counsel for the appellant, in particular with his submission that in the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, the court should give effect to and recognise the contractual rights as determined between the vendor and the purchaser.

Whether Bank Breached Its Duty Of Care By Granting An Extension Of Four Months To D3 To Complete Payment Of The Auction Price Without The Consent Of P1

[58] Clause 8, conditions of sale states:

> Completion
>
> Within 90 days from the date of the auction sale **or the extended completion granted by the Assignee/Bank** (at the Assignee/Bank's sole discretion subject to payment of interest at the rate of interest to be determined by the Assignee/Bank), the Purchaser shall deposit with the Solicitors appointed by the Assignee/ Bank simultaneously:
>
> a. a sum equivalent to 90% of the successful bid ("Balance Sum") and interest for the extension period (if any) made payable to HSBC BANK MALAYSIA BERHAD. The amount of the cheque shall include outstation clearing charges which shall be borne by the Purchase, failing which, the deficiency shall be recoverable from the Purchaser …

[59] I find there is no merit to the allegation that the completion period in the sales contract was extended by four months, and as such tainted the sale. Firstly, condition 8 empowers the bank to grant the extension of time.

Second, written agreements can be varied by consent – *Paul Murugesu Ponnusamy Sebagai Wakil Nalamah Sangapillay (P) (Simati) v. Cheok Toh Gong & Ors* [1996] 2 CLJ 397; [1996] 1 MLJ 843.

[60] *Ho Kean Pin v. Malayan Banking Bhd & Anor* [2020] 1 LNS 1107; [2020] MLJU 1435 and other authorities cited by the plaintiffs are distinguishable as the sale here does not involve charged lands where the provisions of the NLC are strictly applied.

[61] The plaintiffs appeared to "throw the whole kitchen sink" of alleged complaints in their submissions for the court to consider. I should nevertheless for completeness deal with them:

(i) I find no merits to the alleged non-disclosure by the bank on shortfall of arrears. This complaint is not pleaded. At any rate, the evidence show the bank did through its letters and email inform P1. It is trite law that parties are bound by their pleadings – *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415; [2018] 2 MLJ 292. Specifically, the Federal Court in the case of *Instantcolor System Sdn Bhd v. Inkmaker Asia Pacific Sdn Bhd* [2017] 4 CLJ 1; [2017] 2 MLJ 697 had held that:

> [60] It is a cardinal rule that parties are bound by their pleadings and are **not allowed to adduce facts and submissions on matters which they had not pleaded.** Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment (see: *State Government of Perak v. Muniandy* [1986] 1 MLJ 490; *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313 and *Blay v. Pollard and Morris* [1930] 1 KB 628). (emphasis added)

(ii) As for the non-disclosure by the bank to the formal request by the plaintiffs of 27 August 2020 to reveal arrears and payments made, this was made after action was filed. The bank did render the statement of accounts dated 18 September 2020, as well as detailed statement of accounts which has not been challenged or shown by the plaintiffs to contain manifest errors. The last payment was shown to be made in July 2017. I also accept the bank's explanation that it could not provide details of payments made by P1 to regularise the account as none was made since July 2017. As for the request for monthly bank statements, they do not form part of the bank's permanent transaction records in the ordinary banking business, and that such statements are merely issued for customer's reference only – *Tey Por Yee & Anor v. Protasco Bhd & Other Appeals* [2020] 5 CLJ 216; [2021] 1 MLJ 76 where the Court of Appeal held as follows:

> Cheques and paying-in slips (such as cheque deposit receipts, transaction slips are not 'banker's books' as they do not permanently record transactions in the ordinary business of a bank. They are either instructions (*eg*, cheques) or documents evidencing the said instructions (paying-in slips) prepared merely for the purposes of customers' convenience.

> **Bank statements are not 'banker's books' as they are created not for the purpose of permanently recording transactions in the ordinary business of a bank, but for customer's reference only.** (emphasis added)

It is also noteworthy that the plaintiffs' notice of application dated 18 November 2020 filed pursuant to s. 7(1) of the Bankers' Books (Evidence) Act 1949 in encl. 125 to inspect and take copies of the entries in the bank's bankers' book for the purposes of this proceedings was dismissed by this court on 19 February 2021. There was no appeal. The plaintiffs are not entitled to reagitate the non-production of the bank statements again at trial. So too the complaint that the bank had failed to furnish full details of the indebtedness periodically to P1, by way of periodical statements and the refusal to provide the log in visitors' record. These were not pleaded. The case of *Noresah Lani v. RHB Bank Bhd* [2006] 8 CLJ 307; [2006] 7 MLJ 378 cited by the plaintiffs' counsel is distinguishable as Noresah was paying her loan instalments and had been requesting for statements but here, there is no evidence to show any request was made for bank statements until 27 July 2020 after action was filed and after the auction on 19 November 2019. Further, payments had not been made since July 2017. The invocation of s. 114(g) of the Evidence Act 1950 by the plaintiffs is misconceived. The assertion that P1 had on various occasions made part payments, is a bare statement.

(iii) The plaintiffs posit that breach of the Auction Sales Enactment F.M.S Cap. 81 (No. 2 of 1929) alone is sufficient to set aside the auction conducted on 19 November 2019 due to the auctioneer not lodging a police report prior to the auction is in my view barking up the wrong tree. In this regard:

(a) the advertisement of the proclamation of sale on 9 November 2019 in the New Straits Times (pp. 342 to 355, CBD3) which is more than seven days before the auction has fulfilled s. 4 of the said Enactment which reads:

> (1) Every auctioneer shall before conducting a sale by public auction give public notice thereof, setting out the particulars of the property to be offered for sale and stating the time and place at which the auction will be held, **not less than seven (7) days before the date fixed for auction;**
>
> (2) The auctioneer can only reduce such notice period to **two days** with the permission in writing of the chief Police Officer. (emphasis added)

(b) I accept DW1's evidence at p. 647 NOP, vol 3, that in his many years as an auctioneer, it is not necessary to lodge a police report and this applies to court and land office auctions a well.

(iv) I find P1's right to make payment before conclusion of sale is not breached as there is nothing on record to show any attempt was made to do so except for the alleged attempt to pay RM111,603 *vide* the Hong Leong Bank banker's cheque which was blown to smithereens as a blatant lie since the said banker's cheque was encashed two weeks before the auction.

(v) The plaintiffs' complaint that the conduct of the bank has breached s. 124 of the FSA is in essence a bare assertion as there is no evidence to show the bank engaged in any prohibited business conduct as set out in Schedule 7 to the FSA 2013.

As Between P2 And The Bank: Whether The Bank Owes Any Duty Of Care To P2; And If So, Whether The Bank Is Vicariously Liable To P2 For The Action Of D2 In Allegedly Denying P2 From Bidding For The Property On 19 November 2019?

[62] It is imperative to bear in mind that P2 is not a party, and is not privy to the agreement and/or DOA entered into between the bank and P1. He has no registered interest in the assigned property. The bank as such, does not owe him any duty of care whether contractually or otherwise as P2 is a stranger to the lending transaction and/or security.

[63] Having earlier found there is a paucity of evidence that P2 was in fact present and denied from bidding by D2, the bank being vicariously liable for does not even arise.

[64] I reject P2's reliance on the power of attorney dated 22 April 2018 (ID-2) said to have been given by P1 to P2 is not registered with the High Court as required by s. 4 of the Powers of Attorney Act 1949 which reads:

4 Deposit of power of attorney

(1) Except as hereinafter provided no instrument purporting to create a power of attorney shall, after the commencement of this Act, have any validity to create such power within Peninsular Malaysia until:

(a) a true copy of the said instrument duly compared therewith and marked by the Senior Assistant Registrar with the words "true copy"; or

(b) where the original instrument is deposited in the registry of the Supreme Court in Singapore, an office copy of such instrument, has been deposited in the office of a Senior Assistant Registrar.

[65] The procedure of registration with the High Court is mandatory. In the present case, it is undisputed the power of attorney by P1 to P2 is not registered. As such, the alleged power of attorney is not valid and/or enforceable. In any case, at pp. 144 to 145 NOP, vol. 1, P2's evidence is telling:

SK: Ok. So, you didn't register it. You agree?

Tharan: I agree I did not register it.

…

SK: I put it to you that the documents at page 10 to 14 is not a valid document or genuine document. Power of attorney.

Tharan: This one, I agree. I agree. There was a missed document inside there. Can we rectify this document or not? I don't there's no –

[66] At any rate, there are authorities that are instructive on this point in that, a donee (P2) under a power of attorney cannot bring an action in his own name to assert the donor's rights or claims. This well-settled legal proposition is borne out by the following authorities:

(i) *Jones & Saldanha v. Gurney* [1913] WN 72 where the court struck out the donee of a power of attorney on the ground that he was improperly or unnecessarily joined as a co-plaintiff.

(ii) In *Campbell v. Pye* (1954) 54 SR (NSW) 308, the court dismissed the action brought by an agent on the ground that he is incompetent to bring the action in his own name. The court held:

> The general rule is clear that an attorney cannot sue on behalf of his principal in his own name. Authority for this rule is to be found in *Frontin v. Small* (1); *King of Spain v. Machado* (2); *Berkeley v. Hardy* (3); *Gray v. Pearson* (4); *T. P. Jordeson & Co. & Kahn v. London Hardwood Co. Ltd.* (5); *Jones & Saldanha v. Burney (6) and Bertram v. Metters* (7).

(iii) In *Wee Tiang Kheng & Ors v. Ngu Nii Soon & Ors* [1989] 1 CLJ 267; [1989] 2 CLJ (Rep) 639; [1989] 1 MLJ 252, the High Court set aside a judgment in default against the second and third defendants on the ground, amongst others, that the first plaintiff who sued as a donee of a power of attorney had no cause of action and no right to bring the action in his own name. The High Court applied the English case of *Jones & Saldanha v. Gurney* and held:

> Another contention is that the first named plaintiff Wee Tiang Kheng, not being a registered co-proprietor of the shophouse as alleged in the statement of claim, has no reasonable cause of action against the second and the third defendants and the judgement is therefore bad.
>
> It is not disputed that at all material times the first named plaintiff Wee Tiang Kheng was not and is not a registered co-proprietor of the shophouse. He was and is a donee of the power of attorney created by one Julian Wee Lip Jin. On the evidence, Wee Tiang Kheng clearly was and is not a registered co-proprietor of the shophouse as alleged in the statement of claim. In *Jones & Saldanha*

v. Gurney [1913] WN 72 an attorney appointed under a power of attorney sued as a co-plaintiff. It was held that the statement of claim showed no cause of action in the attorney and that his name was improperly joined. It appears clear that a person authorised to sue and suing under a power of attorney on behalf of his principal has to sue in the name of the principal: *Jones & Saldanha v. Gurney* [1913] WN 72.

(iv) In *Wee Tiang Peck v. Teoh Poh Tin* [1994] 1 LNS 154; [1995] 1 MLJ 446 the court held the effect of creating a power of attorney under s. 5 of the PAA is that the vesting of the property in the respondent pursuant to the irrevocable power of attorney did not signify that the applicant had divested himself of the title to his property and transferred the same to the respondent. If the donee is authorised to sue on the donor's behalf, the action should be brought in the donor's name (*Wee Tiang Peck* (*supra*). Importantly the conferment of those powers to the attorney/first proposed intervener does not deprive the first defendant from carrying out the power himself.

(v) In *Liu Yiu Keung Stephen v. Keen Lloyd Resources Ltd (In Liq)* [2007] 1 HKC 605 at para. [9], the court noted other possible abuses, such as "a foreign plaintiff might equally be able to avoid having to give security for costs, or that a person who should properly be the plaintiff in proceedings might be able to avoid having to make proper discovery."

[67] The principle exists to avoid potential abuse by the true plaintiff. In *Davis v. Anthony* [1995] Lexis Citation 1896, the Court of Appeal accepted if an attorney were to be permitted to sue in his own name, an impecunious company might be able to avoid giving security for costs, or the real plaintiff might be able to avoid liability for costs in the event that his claim failed.

[68] Premised on the above authorities, even assuming the power of attorney is valid, P2 is incompetent to bring this action against the bank in his own name in respect of all matters concerning the property, the agreement and the DOA.

[69] Not only that, I agree with the bank's argument that P2 cannot purport to act as an "attorney" of P1 in relation to the said property as P1 has already executed an irrevocable power of attorney dated 28 February 2006 in favour of the bank (at pp. 132 to 136, CBD1).

As Between P1, P2 And D2

[70] The issues whether P2 registered to bid for the auction on 19 November 2019 at Cosmo Hotel; whether P2 gave Hong Leong Banker's cheque no. 148987 for sum of RM111,603 to D2 on the date of the auction; and whether the auction was properly conducted in accordance with the terms of the proclamation of sale and sold to D3 as the successful bidder have

already been dealt with earlier. I shall not repeat what I have said save to say that it applies to these issues. As for the remaining complaints, I find as follows:

(i) the complaint of there being no CCTV recording in the hall/room where the auction took place has no valid basis. I accept DW1's evidence there is no such requirement;

(ii) the complaint that the proclamation of sale was not posted at the property address rings hollow. There is produced to the court the statutory declaration of Radha Krishnan a/l Subramaniam who confirmed that he was prevented from entering the subject property compound by the security guards when attempting to post the proclamation of sale and conditions of sale on 8 November 2019. Obviously, he was unable to serve the proclamation of sale and condition of sale to P1 not due to any fault of the defendants. I accept the statutory declaration as a sworn statement under oath as admissible evidence – see *Mercu Pusu Development Sdn Bhd v. Setara Jaya Sdn Bhd* [2022] 2 CLJ 106; [2022] MLJU 512 at [54]. I find there is no prejudice to P1 as the auctioneer has provided public notice of the auction held on 19 November 2019 by advertising the relevant proclamation of sale in New Straits Times on 9 November 2019.

As Between Plaintiffs And D3

[71] The question of whether D3 was present at the auction and is the successful bidder has already been dealt with and I shall not repeat what I have said save to say that it applies to this issue. There are therefore only the following remaining questions left to be considered.

Whether There Was Delay By The Plaintiffs In Filing This Action Against D3

[72] Viewed against the fact that the plaintiffs were seeking a declaration that the auction of the property held on 19 November 2019 is null and void, the plaintiffs ought to have moved the court promptly and not wait until D3 has made full payment and completed the auction sale. Upon completion, D3 has acquired both a legal as well as beneficial interest in the property.

[73] In dismissing the plaintiffs' application on 21 October 2020 for an injunction in encl. 17 to restrain the third defendant from taking possession of the property, I had found that the sale being already completed, the plaintiffs' remedy (if any) if they are correct in their assertions, the gist of which are that the sale was at an undervalue, and the auction held on 19 November 2019 that it was conducted improperly and not being given the opportunity to bid 'in my respectful view' should be confined to a claim in damages, against the bank and the auctioneer. There was no appeal against that finding.

[74] My view after trial has not changed after hearing the witnesses. As it turned out, the plaintiffs' complaints were found not to have any basis.

[75] In the case of *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd Bhd* [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109; [1992] 2 MLJ 504, Edgar Joseph Jr. J (as he then was) said:

> There is authority for saying that a sale at an undervalue is not automatically set aside, (see *Davis v. Taytlor* [1948] 48 SR (NSW) 514; *Kennedy v. De Trafford* [1897] AC 180). But the undervalue may be so gross as to indicate fraud or, at least, want of proper standards of care. (See *Campbell v. Campbell* [1916] 21 CLR 308). The case of *Khoo Cheong Puay v. The Overseas Banking Corp Ltd. & Ors* [1935] MLJ 93 shows how difficult it is to have a sale set aside on the ground of undervalue for their Mills, J, said "to set aside a sale on ground of gross undervalue, such undervalue must, at the date of the contract of sale, be sufficient gross to be itself conclusive and decisive evidence of fraud."

[76] There is no doubt in this case that the bank was entitled to sell the property due to default by P1 in servicing the loan. As stated earlier, I do not find that the sale was at an undervalue. Even if I am wrong, a sale at an undervalue does not mean that the auction is automatically set aside unless the undervalue is so evident as to be decisive of fraud or gross want of the proper standard of care; there is not a scintilla of evidence here that there is gross want of care or fraud.

[77] All things considered, the plaintiffs' fight for the property must in my considered view yield to the higher claim of D3 as the successful bidder who had completed the purchase. I can be forgiven for saying that the complaints raised are offered as part of the plaintiffs' stratagem to buy time, cling on to the property while the suit "drags its weary length before the court" and to avoid the inevitable.

Whether Plaintiffs Are Entitled To Any Relief Sought Against The Defendants

[78] After evaluating and deliberating on all evidence led, testing the oral and documentary evidence against each other, and having fully considered all the submissions put forward by counsel, and for the reasons already highlighted above, I am satisfied that both P1 and P2 have not proved their claim on the balance of probabilities against all three defendants and as such, are not entitled to any of the relief sought. Accordingly, P1 and P2's claims are dismissed with costs.

D3's Counterclaim

Whether D3 Is Entitled To Vacant Possession Of The Property After He Completed The Purchase And If So, Whether He Was Prevented From Taking Vacant Possession Of The Property After He Completed The Purchase; And Whether D3 Has Suffered Losses And Damages And Entitled To Claim Such Losses From P1 And P2

[79] D3 has proven he was present at the auction and it cannot be disputed that D3 has made full payment and completed the auction sale. His counterclaim succeeds:

A (i) D3 is entitled to judgment for vacant possession of the property to be delivered to him within 21 days of this judgment (and not seven days);

(ii) D3 has attempted and was prevented from taking vacant possession of the property after he completed the purchase; this is evident from the plaintiffs' own assertions of trespass by D3; to frustrate D3 from taking
B vacant possession, the plaintiffs in fact applied for an injunction to restrain D3 from taking possession of the property; and

(iii) D3 has suffered losses and damages and entitled to claim such losses from P1 and P2.

C **[80]** However, I find the special damages of RM10,000 a month claimed was not broken down and itemised in the pleadings; the interest paid on the loans taken to complete the property was not pleaded; although in submissions it was particularised. In my view, it is just to award general damages of a sum of RM5,000 a month for loss of rental or as damages for
D being kept out of use of the property from 15 June 2020 (date of full payment of purchase price) to date of delivery of possession; exemplary damages at RM37,500 (computed on the basis of 25% of the general damages which at date of judgment works out to RM150,000), interest at 5% per month on the sums awarded from date of filing of counterclaim to full payment.

E **[81]** In granting the claim for exemplary damages, it is to state the court's disapproval of such conduct. The plaintiffs could have paid the bank if they wanted to cling on to the property. I am of the view that this is an appropriate case for exemplary damages to be granted. D3 has been deprived of his fundamental right to property under art. 13 of the Federal Constitution. The
F court ought to attend to his rights to property with care. I find the plaintiffs' conduct had been calculated by them to make a profit for themselves as explained by Lord Devlin, *Rookes v. Barnard* [1964] AC 1129 at p. 1226). Whilst "throwing the whole kitchen sink" at the defendants, the plaintiffs or their family members have the calculated benefit of occupying the property
G rent free, which might well exceed the compensation payable to D3. Not to award exemplary damages would in my mind not vindicate the law and the breach of D3's rights. The amount awarded in my view is commensurate with the actions of the plaintiffs and in accord with the principles in *Sin Heap Lee - Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35; [2005] 1 MLJ 515 and *Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1992] 1 LNS 7;
H [1993] 1 MLJ 493 where exemplary damages was calculated at 25% of the award for compensatory damages. I also find there is no acceptable reason why the claim for damages by D3 should be directed at the bank, or for that matter, the auctioneer premised on the facts here.

I

[82] As for costs, the plaintiffs offered RM20,000 for each defendant. The bank has urged for a sum of RM150,000 on the basis that the trial took eight days and numerous submissions were filed. D2 on the other hand had to subpoena witnesses and asked for same amount; D3 asked for RM200,000 as he has a counterclaim as well. After taking into account the criterias in O. 59 r. 16 of the Rules of Court 2012 in assessing costs, P1 and P2 are ordered to jointly and severally pay costs of RM100,000 to the bank, RM80,000 to D2, RM100,000 to D3; all costs being subject to allocator.